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IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,

Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,

Appellees.

MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA.

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MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA.

Appellees, pursuant to Rules 16 (1) (c) of the revised Rules of the Supreme Court of the United States move to dismiss the above entitled appeal or in the alternative to affirm the judgment of the United States District Court for the Northern District of Georgia on the ground that the appeal fails to present any substantial Federal question and further it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION PRESENTED

Appellees contend that the sole question to be determined is: WHETHER IT IS MANDATORY UPON THE FEDERAL COURT TO INTERVENE IN AND ENJOIN A STATE COURT PROCEEDING IN THE ABSENCE OF SPECIAL CIRCUMSTANCES WHICH WOULD JUSTIFY FEDERAL INTERVENTION?

CORRECTIONS OF LAW AND FACT

Appellants on page A.22 represent that Georgia Code Section 72-201 entitled "Manner of Abatement" is a valid statute in the State of Georgia. This Code Section, 72-201, was declared unconstitutional by the Supreme Court of Georgia in Sizemore v. Koker, 220 Ga. 773; 141 S.E. 2d 891 in 1965, 7 years prior to the filing of these proceedings.

The State Court proceeding filed by Appellees in their official capacity, involves transactions extending from July 28, 1971 to May 31, 1972, and was not based on a single isolated transaction. Jurisdictional Statement Page 5.

STATEMENT

Appellees in their official capacity filed an action to abate a nuisance upon the authority of new Georgia Code Section 26-2103 and Section 26-2104 enacted in 1971 by the General Assembly of Georgia in an act which became effective on April 1, 1971. This statute has not been construed or passed upon by the Trial Courts or the Appellate Courts in the State of Georgia.

All of the alleged obscene material referred to in the Complaint in the State Court action were purchased

from the Defendant and at no time was any material seized under a Judicial process. On the same day the State Court ordered Plaintiffs (Appellants herein) to show cause why their book store should not be abated as a public nuisance they filed their Petition for Removal in the United States District Court for the Northern District of Georgia upon the grounds that "Petitioners cannot enforce, in the Courts of the State of Georgia, a right under the free speech and press provisions of the Constitution of the State of Georgia***." A copy of the State Court Complaint was attached thereto however they failed to include the Exhibits which were made a part of and incorporated in the Complaint and which are attached hereto. These Exhibits are a series of photographs which portray the exterior signs and interior displays of the material sold by Appellants, imitation penises and the female dummy with her vagina exposed which according to the Complaint occupies a prominent position in said building.

The Appellants thereafter and on August 28, 1972, filed their Complaint in the United States District Court for the Northern District of Georgia, for a preliminary injunction, permanent injunction, declaratory judgment and convocation of a three-judge court challenging the constitutionality of the Georgia statutes as written and as applied and requested the Court to intervene in the State Court proceedings and enjoin further use of the allegedly unconstitutional Georgia statutes.

A three-judge Court was convened and after a hearing during which Plaintiffs (Appellants herein) consistently responded that they could raise the same issues of constitutionality in the Georgia State Courts,

and finding no special circumstances which would justify Federal intervention the Court dismissed the Complaint on February 22, 1973.

REASONS FOR GRANTING THE MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

As recently as May 7, 1973, this Court in the case of Thomas S. Gibson v. L. M. Berryhill Case No. 71-653, 41 U.S.L.W. 4576, 4579 restated the doctrine of abstention:

> "and finally, there is the doctrine developed in our cases at least since Railroad Commission v. Pullman, 312 U.S. 496 (1941), that when confronted with the issues of constitutional dimensions which implicate or depend upon *unsettled questions of State law* a Federal Court ought to abstain and stay its proceedings until those State law questions are definitely resolved." (Emphasis Added).

Appellees recognize that in Mitchum v. Foster, 407 U.S. 225; 32 L.Ed.2d 705 decided June 19, 1972, it was held that Federal Courts are not absolutely without power to enjoin a proceeding pending in State Court under any circumstances whatsoever. Mitchum was remanded for further proceedings consistent with that opinion.

Mr. Chief Justice Burger, with whom Mr. Justice White and Mr. Justice Blackmun joined in a concurring opinion stated:

> "I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds only that 28 USC Section 2283, which is an absolute bar to injunctions against state court

> proceedings in most suits, does not apply to a suit brought under 42 USC Section 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Ante, at ——, 32 L. Ed. 2d at 718. In the context of pending state criminal proceedings, we held in Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S. Ct. 746 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore on remand in this case, it seems to me the District Court, before reaching a decision on the merits of petitioner's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in Younger, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case."

The three-judge tribunal in the case at bar did properly consider whether the general notions of equity or principles of federalism prevent the issuance of an injunction against the state court proceedings and remanded the case to the State Court quoting the above concurring opinion and further stating in the last paragraph of said order:

> "Furthermore, Plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia State Courts. *Consequently, this Court holds that the Georgia State Court suit has not been brought in bad faith or for the purposes of harassment and that*

Plaintiff has failed to present any "special circumstances which would justify federal intervention."

This is consistent with the long and continuous lines of decisions from this Court and the United States Courts of Appeal. Palaio v. McAuliffe, 456 F. 2d 1230 (5th Cir. 1972); Cousins v. Wigoda, 463 Fed. 2d 603 (7th Cir. 1972) and the 4th Circuit which held in the case of Lynch v. Snepp, ____F. 2d____, 41 U.S.L.W. 2401:

> "The long standing public policy against federal court interference with state court proceedings generally means that the jurisdiction of a state court first obtained should not be interfered with by federal courts.
>
> "The 'pendency' of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is appropriate. . . . Because of the cost involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts and the clear obligation of state courts to decide questions arising under the United States Constitution, there is a presumption against federal interference."

In Judge O'Kelley's concurring opinion dismissing the complaint and remanding this case to the State Courts he stated:

> "If a state trial judge errs, the Supreme Court of Georgia is available to correct his error. If they both err, that is not the end of the avenue when a federal constitutional right is at stake. The Supreme Court of the United States may accept certiorari and review the case even though it has found its course there through the state court system. This is federalism."

CONCLUSION

For all of the foregoing reasons Appellees respectfully conclude that the order and judgment of the United States District Court for the Northern District of Georgia should be affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, that I have this day deposited in the United States Post Office, Atlanta, Georgia, two (2) copies of the foregoing Motion To Dismiss The Appeal Or To Affirm The Judgment Of The United States District Court, Northern District of Georgia with First Class postage pre-paid, addressed to MR. ROBERT EUGENE SMITH, GILBERT H. DEITCH and D. FREEMAN HUTTON, 2005 One Hundred Colony Square, Atlanta, Georgia 30361, Counsel of record for Appellants.

That all persons required to be served have been served.

This the _____ day of June, 1973.

THOMAS R. MORAN
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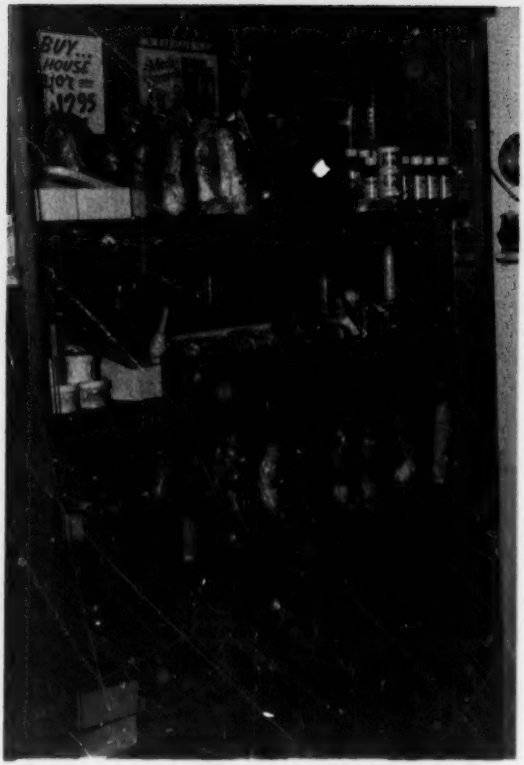
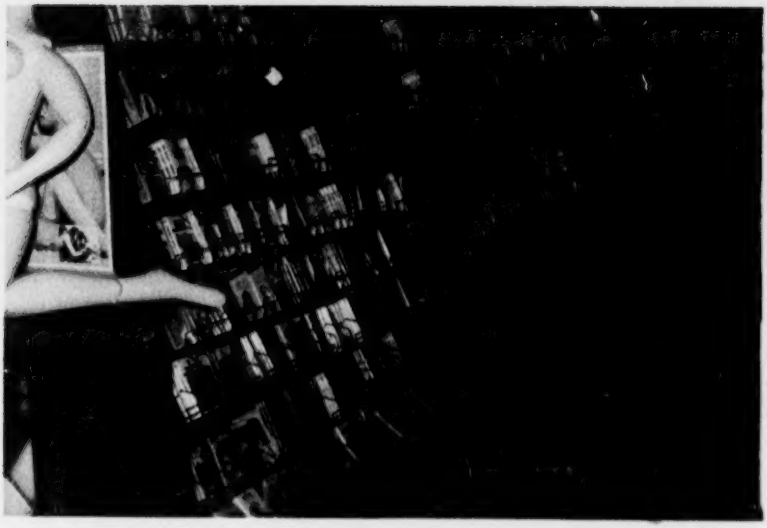
Atlanta, Georgia 30303

EXHIBIT "A"

IGHT IS ON
IN THE ARMY, OR NOT ....
HERE IS YOUR
DISCHARGE PAPERS
IS IN USE
ALL NEW AND


BUY...
HOUSE
LOT
$1295



7-A

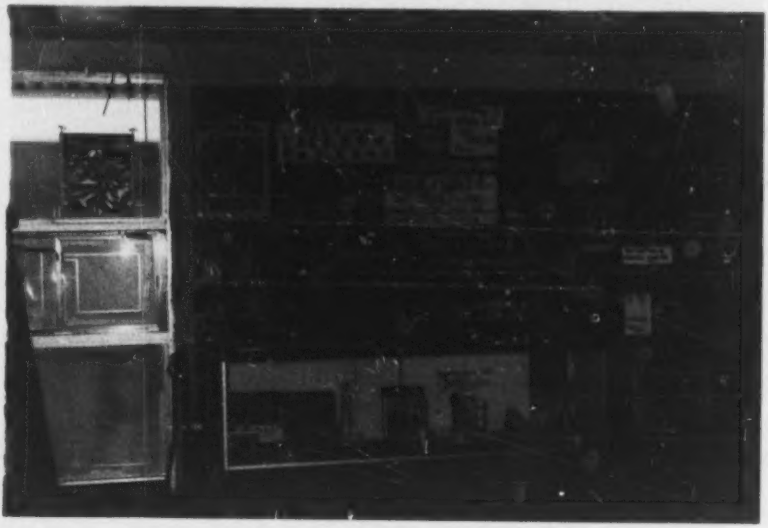
10-A

11-A

Hitchhiker
Hitchhiker

Please ...
REGULAR & SUPER 8MM
MOVIES ... 200 FT.
COLOR $19.95
COLOR $24.95

15-A



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